BANK OF COMMERCE (M) BERHAD

v.

TAN BOON SOON @ TAN PO LO
(TRADING AS MESSRS SYARIKAT SOON TATT TRADING) & ANOR.

HIGH COURT MALAYA, PENANG
TUAN T. SELVENTHIRANATHAN J.C.
[CIVIL SUIT NO. 22-193-89]
13 DECEMBER 1993

PRACTICE & PROCEDURE: *Appeal against dismissal of application for summary judgment - Guarantor not informed of security for the loan - Guarantor also not aware that the security was disposed of - Whether there were triable issues.*

This was an appeal against the decision of the learned Senior Assistant Registrar dismissing the plaintiff's application for summary judgment against the second defendant.

The plaintiff had granted certain credit facilities to the first defendant, in respect of which the second defendant had given a written guarantee. The first defendant defaulted in payment. The plaintiff filed the present action claiming against both the defendants the outstanding sum of RM229,885.29 interest and costs. This sum was modified in the affidavit in support of the application for summary judgment against the second defendant to RM259,398.07. Judgment in default of appearance was entered against the first defendant for the sum of RM129,182.31. The plaintiff had failed to plead or disclose in its statement of claim that the credit facilities it had granted to the first defendant were secured to the extent of RM312,000. The plaintiff had disposed of part of the security but had failed and/or neglected to notify the second defendant of the realization of the security which would be treated by the plaintiff as payment to it by the first defendant.

Held:

[1] The guarantee itself provided in clear terms that the ultimate balance was to be determined after deducting all payments received or credited to the account of the first defendant from the proceeds of securities held by the plaintiff. Therefore to arrive at this ultimate balance, the plaintiff was required by the guarantee itself, which it sought to enforce against the second defendant, to account for all such payments.

[2] It also cannot be gainsaid that the plaintiff was under a duty to disclose in its statement of claim the provision of securities by the first defendant and the realization thereof, either in its statement of claim or in its application for summary judgment.

[Plaintiff's appeal dismissed with costs. Second defendant granted unconditional leave to defend]

Cases referred to:

Amanah Merchant Bank Bhd. (formerly known as Amanah - Chase Merchant Bank Bhd.) v. Lim Tow Choon (menerusi Pegawai Pemegang Harta) ***(foll)***
Heng Cheng Swee v. Bangkok Bank Ltd [1976] 1 MLJ 276 ***(dist)***
United Malayan Banking Corporation Berhad v. Palm and Vegetable Oils (M) Sdn. Bhd. and Ors. [1983] 1 MLJ 206 ***(foll)***
Oriental Bank Bhd v. Jaafar Sidek bin Mohd Salam and 2 Ors. [1990] 2 CLJ 72 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14, r. 1

For the plaintiff - Bernard YF Kok; M/s. Ban Eng, Anual & Foong
For the second defendant - K. Sarasvathy; M/s. Devan, Hussin & Co.

JUDGMENT

T. Selventhiranathan JC:

This was an appeal against the decision of the Senior Assistant Registrar given on 23 May 1991 in favour of the second defendant dismissing the plaintiff's application by way of summons in chambers [enclosure (16)] for judgment to be entered against the second defendant in favour of the plaintiff pursuant to O. 14, r. 1 of the Rules of the High Court 1980 ("the Rules").

The plaintiff, Bank of Commerce (M) Berhad ("the bank"), had granted certain credit facilities to the first defendant, Tan Boon Soon @ Tan Po Lo trading as Messrs Syarikat Soon Tatt Trading ("the principal"), in respect of which the second defendant, Koh Meng Pheow, had given a written guarantee, the material terms of which were as follows:

> In consideration of ... (the bank) ... opening and continuing an account/s or continuing the existing accounts or making or continuing advances or otherwise giving credit or affording banking facilities and accommodation or not terminating or withdrawing any such account advance credit or banking facilities or accommodation already made or given for as long as you may think fit to Messrs Syarikat Soon Tatt Trading (i.e the first defendant) ... (hereinafter called the "principal") ... either alone or jointly with any other person or persons I/we Mr Koh Meng Pheow (ie the second defendant) jointly and severally guarantee, on demand in writing being made to me/us, the due payment of all advances, liabilities, bills and promissory notes, whether made, incurred, or discounted before or after the date hereof, to or for the principal, either alone or jointly with any other person or persons, and also of all bills, promissory notes, or guarantees held by the bank bearing the principal's signature/common seal, together with interest, commission, and other banking charges including legal charges and expenses ...
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> ... And this guarantee shall be applicable to the ultimate balance that may become due to the bank from the principal and until repayment of such balance the bank shall be entitled to retain, realise or otherwise dispose of in such manner as the bank may think fit any securities now or hereafter held by the bank and without any liability to account to me/us for any proportion of such securities or of the proceeds thereof until the said ultimate balance shall have been satisfied, and, in the meantime, I/we will not take any steps to enforce any right or claim against the principal in respect of any moneys paid by me/us to the bank hereunder.
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> And, further, that if the bank should receive payments from the principal, or any person or persons as aforesaid liable to the bank, or from any security held by the bank, or if the principal, being an individual or individuals, or any person or persons as aforesaid liable to the bank, shall become bankrupt or insolvent or enter into any arrangement or composition with his or their creditors, or being a company shall go into liquidation, the bank shall be at liberty without discharging my/our liability to made or assent to any companies, compositions or arrangements, or to prove and to rank as creditors in respect of the general balance of the bank's account, or any item or items thereof, and to receive dividends thereupon, and all such payments and dividends received shall be treated as payments in gross, and my/our liability shall extend to the ultimate balance after deducting such payments, other than payments made by any co-surety for the full sum hereby guaranteed, and to the entire exclusion and surrender of all my/our rights as surety in competition with the bank, the laws for the time being relating to bankruptcy or any rule of law or equity to the contrary notwithstanding.
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> ...
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> In the event of this guarantee being determined either by notice by me/us or my/our legal personal representatives, or by demand in writing by the bank, it shall be lawful for the bank to continue the account with the principal, notwithstanding such determination, and the

liability of myself/ourselves or my/our estate/s for the amount due from the principal at the date when the guarantee is so determined shall remain, notwithstanding any subsequent payment into or out of the account by or on behalf of the principal. Provided always that the amount for which I/we shall be liable under this guarantee shall not exceed dollars one hundred and forty thousand only (RM140,000) and interest on such amount or on such less sum as may be due, at such rate as shall be payable by the principal from the date of the principal's default until payment together with all costs, expenses incidental to the recovery of the aforesaid principal and interest including legal costs.

...

I agree that a copy of the account of the principal contained in the bank's book of account (or of the account of the preceding six months if the account shall have extended beyond that period) signed by the manager for the time being of the office at which such account shall be kept, or any office of the bank, shall be conclusive evidence against me/us of the amount for the time being due to the bank from the principal in any action or other proceeding brought against me/us upon this guarantee.

... And, further, the bank may recover against me/us the extent hereinbefore mentioned...

The first defendant defaulted in payment. A notice of demand dated 1 December 1988 was served on the second defendant demanding from his payment of a sum of RM223,960.33 owed by the first defendant to the plaintiff as at 31 October 1988.

The plaintiff then filed the present action on 20 April 1989 wherein it claimed against both the defendants the **outstanding sum of RM229,885.89 as at 31 January 1989,** interest and costs. This sum was modified in the affidavit in support of the application for summary judgment against the second defendant to RM259,398.07, as being the outstanding sum owing as at 31 March 1990. On 4 May 1990, judgment in default of appearance was entered against the first defendant for the **sum of RM129,182.31 as at 31 January 1989.** It will be immediately apparent that this sum differed greatly from the outstanding sum stipulated in the statement of claim as being owed also on 31 January 1989, which could only mean that payments had been made or credit had been given towards the first defendant's outstanding account when judgment was entered against it. Yet when the application for summary judgment against the second defendant was made on 8 September 1990, the outstanding sum as at 31 March 1990 had burgeoned to RM259,398.07, a figure more than double the judgment sum of RM129,182.31 obtained against the first defendant as being owed as at 31 January 1989!

Furthermore, the second defendant contended that the plaintiff had failed to plead or disclose in its statement of claim that the credit facilities it had granted to the first defendant were secured to the extend of RM312,000.00 after excluding liabilities in respect of the securities. The plaintiff had disposed of part of the security (and building charged to the bank by the first defendant) but had failed and/or neglected to notify the second defendant of the realization of the security which would be treated by the plaintiff as payment to it by the first defendant. The second defendant's liability, if any, should therefore extend to the ultimate balance after deducting the sum realized on disposal of the security. No details of the disposal of the security was given to the second defendant nor credit given therefor in favour of the second defendant in accordance with the guarantee. The second defendant also raised other objections, namely, that there had been misrepresentation by the plaintiff's agent in relation to the guarantee and that he had not signed the guarantee before an advocate and solicitor as alleged, that the guarantee exhibited to the affidavit of the plaintiff was not the one that he had signed, and that he had no notice of the notice of demand purportedly served on him.

I found these latter three objections raised by the second defendant to be without merit and I therefore do not propose to discuss them in detail as the written guarantee bears the signature of the second defendant on every page. There is also an affidavit by the advocate and solicitor who purportedly explained to the second defendant the contents of the written guarantee and witnessed its execution. However, it is interesting to note that this affidavit of the advocate and solicitor does not state whether he witnessed the execution of the guarantee although his stamp is appended at the end of the guarantee. Contrasted against this are the words in the guarantee "Place: UAB Penang" which indicate that the guarantee was executed at the plaintiff's office, the plaintiff being previously known as United Asian Bank Berhad.

As for the argument that the second defendant had no knowledge of the notice of demand, the guarantee provides as follows:

> A demand in writing shall be deemed to have been duly given to me/us or my/our legal personal representative by sending the same by post addressed to me/us at the address/ respective addresses herein written or at my/our last known address and shall be effectual notwithstanding any change of residence or death and notwithstanding notice thereof to the bank, and such demand shall be deemed to be received by me/us or my/our legal personal representatives twenty-four hours after the posting thereof, and shall be sufficient if signed by any officer of the bank, and in, proving such service it shall be sufficient to prove that the letter containing the demand was properly addressed and put into the post office.

The notice of demand was sent to the second defendant by AR registered post by the plaintiff's solicitors. No doubt the guarantee provides for the demand to be made by ordinary post but as the plaintiff elected to send it by Ar registered post, it did not in any way detract from the requirement of sending such notices by post, under the guarantee: see the decision of the Supreme Court in Civil Appeal 02-172-93, the case of *Amanah Merchant Bank Bhd. (formerly known as Amanah-Chase Merchant Bank Bhd) v. Lim Tow Choon (menerusi Pegawai Pemegang Harta)* per the judgment of Mr Justice Dato' Mohamed Dzaiddin bin Hj Abdullah SCJ at pages 6 to 10 as follows:

> In this appeal, the complaint of the appellant was that the learned Judge should have decided that the appellant had proved that the notice of demand dated 4 March 1988 was delivered to the respondent. In this respect, the thrust of Encik Dawson's submission, both in the Court below and before us, was that since the notice of demand was correctly addressed, prepaid and delivered to the post office and acknowledged by the postal authority, a presumption arose that the said notice had reached the respondent at the given address and was deemed to have been received by him on the following day, a day after the postal authority acknowledged receipt of the notice for service. It was then for the respondent to rebut this presumption, where, by his absence at the trial, he had failed to do so. Counsel commented that the learned Judge seemed to require the appellant to prove strictly that the notice of demand had been effectively served on the respondent by the return of the AR card with the acknowledgement of receipt. Counsel also submitted that the learned trial Judge was wrong in holding that the deeming provision in clause 17 was only good for ordinary post.
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> The central issue in the present appeal is whether on the proper construction of clause 17 of the said guarantee it could be held that it is sufficient to prove that the notice of demand was duly served on the respondent by sending the same through the post in an envelope addressed to the last known place of address of the respondent, and that it is irrelevant whether it was sent by registered post or by AR registered post or, as was held by the learned Judge, that the deeming provision only applies to a notice sent by ordinary post and that since the

appellant has taken on the added responsibility of sending the notice by AR registered post, it is only upon the return of the AR card with a acknowledgement of receipt that the said notice has been effectively served on the respondent. With respect, we do not agree with the finding of the learned Judge. In construing the words of the guarantee, in our view, the learned Judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances *(Kong Ming Bank Berhad v. Leong Ho Yuen* [1982] 2 MLJ 111; *Bank Bumiputra Malaysia Berhad v. Esah binti Abdul Ghani* [1986] 1 MLJ 16, following the judgment of Fry J in *Lloyd's v. Harper* [1880] 16 Ch D 290. O'Donovan & Philips, in their treatise on the law of guarantee, **The Modern Contract of Guarantee**, 1985 edition, stated at p.145 as follows:

> Thus the guarantee should be given a reasonable business meaning and should not be construed so as to render the guarantee ineffective or illusory. The weight of authority between this "liberal" method of construction and the *contra proferentem* approach taken by Sheppard J in *Scholefield Goodman and Sons Ltd v. Gange* (Unreported, [Supreme Court of New South Wales, 4 Dec 1979]) is almost equally divided. The different views might well be the result of the differing contexts in which the guarantee is given, a more liberal view being taken where the guarantee is given by directors in the context of a major commercial transaction and the *contra proferentem* view being advanced where the guarantee is given in respect of a consumer transaction. On balance it is considered that the Courts will in the future be more likely to interpret guarantees in the same way as any other commercial agreement rather than to apply a strict *contra proferentem* rule to their construction while, at the same time, acknowledging that guarantees have to be interpreted with reasonable regard for the extent of the guarantor's obligation.

Bearing in mind the above principle, the learned Judge ought to have given the word "post" its ordinary and natural meaning and, in the context of clause 17, should not have made a distinction between an ordinary post and an AR registered post. In *T O Supplies (London) LD v. Jerry Creighton LD* [1952] 1KB 42, Devlin J (as he then was) stated at p.45:

> It appears to me that the word "post" in its ordinary and natural meaning is wide enough to cover both registered and ordinary post, and I do not think that it is possible to limit it to one or the other.
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> A letter which is carried through the post, whether registered or not, is still "posted" in the ordinary sense, and registration is merely one way of posting a letter.

In the light of the meaning of the word "post" stated above, it follows that a notice which is sent by post, whether registered or not, is still "posted" in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by AR registered post would not make any difference since registration is merely one way of sending a letter. It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor. See *The Cooperative Central Bank Ltd v. Dato' Seri Mohd Adib Mohd Adam and Ors.* (unreported) (Supra) and *MBf Finance Berhad v. Hasmat Properties Sdn. Bhd. and Ors.* [1990] 1 MLJ 180 (supra) where, in both cases, the notice of demand was required to be sent by registered post. Or there may be instances where a clause in a guarantee may provide the mode of service by prepaid AR registered post. Be that as it may, the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case or AR registered post, to borrow George J's words, 'it is just a sophisticated version of the ordinary registered post'.

> Therefore, on the proper construction of clause 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from clause 17 cannot justify the Court reading those words in clause 17 as was done by the learned Judge. In the context of clause 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

There is a requirement in the present case under the clause pertaining to the demand being made in writing that the demand "... shall be sufficient if signed by any officer of the bank" whereas the notice of demand here was issued by the plaintiff's solicitors, which would beg the question whether there was any valid cause of action in the first place. However, as the second defendant has raised no objection in relation to this infirmity, I leave that issue open.

The contention of the second defendant that the plaintiff should have disclosed in its statement of claim the provision of security by the first defendant, and further the extent to which the security was realized in its application for summary judgment, was brushed aside by Encik Bernard Kok for the plaintiff. He submitted that this was not a valid defence as it was clearly stated in the guarantee that the plaintiff shall not be liable to account to the second defendant for any securities or for the proceeds thereof upon realizing such securities. It was settled law that the effect of the guarantee depended primarily upon its expressed terms: see *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267 at page 274, per Mr Justice Lee Hun Hoe (CJ Borneo as he then was):

> A guarantee is not a contract *uberrimae fidei* and, therefore, there is no obligation on the part of the plaintiff to disclose to the defendant all material facts known to the plaintiff... A contract of guarantee, like all other contracts depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case.

In reliance upon this case Encik Bernard Kok submitted that the relevant part of the guarantee which provided as follows:

> ... this guarantee shall be applicable to the ultimate balance that may become due to the bank from the principal and until repayment of such balance the bank shall be entitled to retain, realize or otherwise dispose of in such manner as the bank may think fit any securities now or hereafter held by the bank and without any liability to account to me/us for any proportion of such securities or of the proceeds thereof until the said ultimate balance shall have been satisfied ...

was tantamount to the second defendant waiving any right of query or complaint as to the securities, and his complaint in the defence as well as in the affidavit in reply to that effect was therefore unjustifiable. In the circumstances, the statement of account of the plaintiff was conclusive evidence of the liability and indebtedness of the second defendant.

With respect, I do not agree. In *Heng Cheng Swee*, the limit of the guarantee given by the appellant there was RM75,000 but advances had been made to the company concerned amounting to RM534,408.74. The respondent bank claimed the payment of the guaranteed sum of RM75,000 from the appellant. Judgment was given in favour of the respondent bank in the High Court and the Federal Court dismissed the appeal of the appellant.

In the present case, however, there were two important aspects of the guarantee which learned Counsel for the plaintiff chose to ignore in his submission. It was an expressed provision of the guarantee that it was applicable to the **ultimate balance** (emphasis added) that may become due to the bank (i.e the plaintiff) from the principal (ie the first defendant) and until repayment of such balance the bank was entitled to retain, realize or otherwise dispose of in such manner as it thought fit any securities held without any liability to account to the second defendant for any proportion of such securities or the proceeds thereof until the said ultimate balance had been satisfied. However, if the bank should receive payments from the principal (or realize proceeds) from any security held by the bank, all such payments received (or proceeds realized) shall be treated as payments in gross, and the second defendant's liability shall extend to the **ultimate balance after deducting such payments** (emphasis added). It was also an expressed term of the guarantee that the second defendant's liability under the guarantee would not exceed RM140,000.00 and interest on such amount or on **such less sum as may be due** (emphasis added).

With respect to learned Counsel for the plaintiff, he has read the provision of the guarantee not making the plaintiff liable to account for the securities *in vacuo* and consequentially as being synonymous with not having to render any account therefor. In my view, such a contention cannot be countenanced, especially in this case where the second defendant is only liable for the ultimate balance due **subject to a limit of RM140,000** (emphasis added). Should the ultimate balance exceed this limit, the second defendant cannot be held liable for the excess sum. The guarantee itself provided in clear terms that the ultimate balance was to be determined after deducting all payments received or credited to the account of the first defendant from the proceeds of securities held by the plaintiff. Therefore to arrive at this ultimate balance, the plaintiff was required by the guarantee itself which it sought to enforce against the second defendant to account for all such payments.

It also cannot be gainsaid that the plaintiff was under a duty to disclose in its statement of claim the provision of securities by the first defendant and the realization thereof, either in its statement of claim or in its application for summary judgment. In *United Malayan Banking Corporation Berhad v. Palm and Vegetable Oils (M) Sdn. Bhd. and Ors.* [1983] 1 MLJ 206, Mr Justice Raja Azlan Shah, acting Lord President (as His Highness then was) stated:

> The appellant however in its statement of claim did not state that the respondents had in fact as security for the credit facilities to be given to the first respondent lodged with the appellant shares (which according to the respondents had as at February 1981 a total market value exceeding RM11 million excluding bonus issue shares)...

In that case, the shares were sold by the appellant after the commencement of the proceedings for RM5,657,763.79 and the appellant applied for summary judgment for the sum of RM3,490,113.26 after giving credit for the sum realized on the sale of the shares. The original sum claimed in the statement of claim was RM8,540,846.34. At the stage of the application for summary judgment, the disposal of the shares was disclosed and judgment was only sought for the balance. Despite this, the Federal Court held that such disposal should have been pleaded in the statement of claim. Speaking for the Federal Court, his lordship had this to say at page 207 of the report:

> As we have said earlier the deposit of the shares as security was not disclosed in the statement of claim when the action was instituted nor was the fact that the security had been realized in a series of sales of the shares between January and September 1980, and these matters were only disclosed for the first time in June 1981 in the affidavit in support of the order 14 summons. This omission is surprising, to say the least, and we cannot but observe

that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co. v. Parr* [1892] 2 QB 14 where Mathew J said that it is most important that a defendant should know from the writ what the exact claim against him is'. The respondents also complain of the timing of the sale and the price realized and we would on this aspect refer to *Cuckmere Brick Co. Ltd. and Anor. v. Mutual Finance Ltd.* [1971] Ch 949 (which was applied in *Duke v. Robson* [1973] 1 All ER 481) that the duty of a mortgagee to a mortgagor when exercising his power of sale is to take reasonable care to obtain a proper price, a duty which has since been extended by the English Court of Appeal to guarantors as well in *Standard Chartered Bank v. Walker and Anor.*, The Times, dated 21 June 1982. We would add that even after the sale of the shares there was and has been no attempt to amend the statement of claim to reflect the true position.

It was submitted on behalf of the second defendant that the securities comprising land and building given by the first defendant had been disposed of by the plaintiff for a sum unknown and presumably the first defendant's business investment amounting to RM150,000 had also been disposed of for a sum unknown. No information or report of the disposal of the land and building and stock in trade of the first defendant and the proceeds so realized had been conveyed to the second defendant nor accounted for in the plaintiff's statement of claim and there was therefore nothing to indicate how the plaintiff arrived at the sum claimed against the second defendant. By reason thereof, the indebtedness of the first defendant could not be ascertained with any degree of accuracy. It will be recalled that judgment had been entered against the first defendant for a sum of RM129,182.31 whereas now an amount more than double that was being claimed against the second defendant as guarantor without deigning or condescending to provide particulars thereof! As Madam Justice Siti Norma Yaakob said in *Oriental Bank Bhd. v. Jaafar Sidek bin Mohd Salam and 2 Ors.* [1990] 2 CLJ 72 at page 73 of the report:

As for the plaintiff's objection that the application was nothing more than an attempt to go behind clause 19 of the guarantee, I do not consider there is any merit to that objection as the presence of a conclusive evidence clause, per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them. This is more so when the guarantors have no say in the affairs of the principal borrower.

In this case there is no disclosure as to the amount realized from the sale of the pledged shares and when such shares were sold. The pledged shares are public quoted shares and dealings on them are regulated by both the Kuala Lumpur and Singapore Stock Exchanges. As at 28 February 1985, the plaintiff has admitted that no less than 179,000 shares had been pledged to them and they represent a 60% margin against advances made by the plaintiff to the first defendant for any given time. Hence the proceeds of sales of such shares depending on the prices of the shares at the time of sale should at least reduce the first defendant's liability by half and yet what is demanded of the defendants is almost the limit of the guarantee.

Then again there is the imposition of the interest rate of 13.75% per annum at monthly rates. Under clause 1 of the guarantee, the defendants had agreed to pay interest at the rate or rates for the time being agreed between the first defendant and the plaintiff. It is not disputed that such rate was agreed at 3.75% per annum above the plaintiff's base lending rate. There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.

In the light of such apparent likelihood of the first defendant's account being incorrect, the application cannot be intended to have the effect of circumventing clause 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the first defendant's indebtedness can be accepted as correct and I

> consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

Similarly, in this case, although the second defendant had disputed the sum claimed by alleging that no credit had been given for the realization of the securities given and there was evidence to this effect in the widely divergent sums claimed from the first defendant as compared with that from the second defendant, yet the plaintiff steadfastly refused to show how the different sums were arrived at, claiming that it was to privileged under the guarantee. With respect, this cannot be the position in law. Otherwise the Court would be lending itself to even the making of false or exaggerated claims by plaintiffs by allowing non-accountability clauses in guarantees to be abused to the extent of the plaintiffs seeking refuge behind their wording.

I was therefore of the view that the plaintiff in this case had failed to prove that it was entitled to summary judgment under O. 14, r. 1 of the Rules in respect of the sum claimed, and its failure to disclose how the sum claimed was arrived at or whether any credit was given for amounts paid or realized in accordance with the guarantee so as to enable it to arrive at the ultimate balance after the deduction of all payments made or amounts realized, raised triable issues which merited determination only after a full hearing. I therefore dismissed the appeal against the decision of the Senior Assistant Registrar with costs and gave the second defendant unconditional leave to defend the action.